FILED
AUG 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-984

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF WASHINGTON LEGAL FOUNDATION, RANDY AND SANDRA ERTMAN, AND ALLIED EDUCATIONAL FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Date: August 23, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Amici curiae address the following issues only:

1. May the federal government commandeer the courts of the State of Texas and require them, in violation of Texas law, to exercise jurisdiction over Petitioner's collateral challenge to his criminal conviction and sentence, despite the availability of federal courts with jurisdiction to hear that challenge?

2. Have the Texas courts already adequately considered Petitioner's claim that he was prejudiced by the failure of law enforcement officials to inform him of his rights under the Vienna Convention?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, RANDY AND SANDRA ERTMAN, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states.[1] WLF devotes a significant portion of its resources to promoting the rights of crime victims and has regularly appeared before this Court and other courts to advocate for greater judicial recognition of those rights as well as the need to streamline appellate review of criminal sentences. *See, e.g., Lynn v. Gathers, cert. denied* 540 U.S. 1141 (2004); *Felker v. Turpin*, 518 U.S. 65 (1996); *Payne v. Tennessee*, 501 U.S. 808 (1991). WLF filed a brief in support of Respondent when this case first came before the Court in 2005. WLF has also appeared before this Court in support of its view that federal courts should base their decisions on international law only to the extent that Congress has decided to incorporate that international law as part of our domestic law. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

Randy and Sandra Ertman are the parents of Jennifer Lee Ertman, one of the two teenage girls who were brutally raped and murdered by Petitioner. Mr. and Mrs. Ertman have endured more than 13 years of appellate review of Petitioner's conviction and sentence and believe that it is time to bring that review to an end. The Ertmans attended each of the trials of their daughter's killers; they were granted the opportunity to

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

address the defendants at the conclusion of several of those proceedings and to describe the tremendous impact that their daughter's murder has had on the lives of her surviving relatives.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici oppose efforts by the federal government to require Texas courts to expand their jurisdiction in order to hear collateral challenges to criminal convictions that, under longstanding Texas law, are not subject to challenge in Texas courts. Throughout our nation's history, the federal government has respected the right of state courts to establish their own procedures for the orderly administration of justice. One particularly venerable procedural rule is the contemporaneous objection rule, which virtually every State employs to bar a convicted criminal from basing a collateral challenge to his conviction on grounds which he could have raised at trial but failed to do so. *Amici* believe that federal government efforts to abrogate that rule in this case amount to an unconstitutional commandeering of the resources of a State court.[2]

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[2]*Amici* do not address the Texas Court of Criminal Appeals's alternative basis for its ruling: that even if the federal government in some instances possesses the authority to order Texas courts to expand their jurisdiction, the President did not properly invoke that authority in this case.

Amici are also concerned that continued delay does not serve the ends of justice. Petitioner's substantive claim (that he was prejudiced by the failure of law enforcement officials to inform him of his Vienna Convention rights) was considered and rejected by the Texas courts more than six years ago. The International Court of Justice (ICJ) has never indicated any dissatisfaction with the manner in which the Texas courts addressed that claim of prejudice. Yet, an end to Petitioner's appeals is nowhere in sight. *Amici* believe that in the absence of any meaningful evidence that Petitioner was prejudiced by the failure to inform him of his right to contact Mexican consular officials, a failure of which his trial counsel was fully aware yet chose not to mention at trial, justice can only be served by a decision rejecting once and for all his efforts to obtain relief in the Texas state courts.

Amici are filing this brief with the consent of all parties. Counsel for Petitioner filed with the Court a blanket consent to all *amicus* briefs on July 11, 2007. A letter of consent from counsel for Respondent has been lodged with the Court.

STATEMENT OF THE CASE

Petitioner Jose Ernesto Medellin stands convicted of the particularly gruesome rape and murder of two teenage girls in Houston, Texas 14 years ago. The victims, 14-year-old Jennifer Lee Ertman and 16-year-old Elizabeth Pena, were friends and classmates at Waltrip High School in Houston. They had the misfortune of running into Medellin and fellow gang members, whom they did not know, while walking home on the evening of June 24, 1993. The gang members brutally raped both girls vaginally, anally, and orally for more than an hour. Medellin and the other gang members then took the girls to a wooded area to be killed so that they could not report the attacks. Medellin personally strangled at least one of the girls,

and perhaps both, with their own shoe laces. He later complained that he had difficulty in getting Jenny Ertman to die and had to step on her throat to finish the murder. The girls' badly decomposed bodies were discovered four days later after a call from a brother of one of the gang members led them to the site.

Overwhelming evidence of Medellin's guilt was presented at his September 1994 trial. In addition to forensic evidence, the evidence included the testimony of several witnesses to whom Medellin had bragged of his exploits immediately after the crime – including boastful statements that both of the girls were virgins until Medellin and other gang members had raped them. The evidence also included inculpatory statements given to police by various gang members (following waiver of *Miranda* rights), including a written statement by Medellin in which he admitted raping Elizabeth Pena but denied direct participation in the murders. On September 16, 1994, Medellin was convicted of murder during the course of a sexual assault. Following the punishment phase of Medellin's trial, during which the jury heard about Medellin's extensive gang-related illegal activity (including a 1992 gang-related fight that led to his expulsion from school), he was sentenced to death on October 11, 1994.

Although Medellin has lived in the United States since he was three years old and speaks English fluently, he was born in Mexico and is a citizen of that country. But despite the claim in Petitioner's brief that law enforcement personnel knew that Medellin was a Mexican citizen, the evidence on that point was equivocal; the state court hearing his habeas corpus petition found that there was no testimony at his trial that he was not a U.S. citizen or that he told anyone that he

was a Mexican national. *Medellin I* Pet. App. 47a.[3] Article 36(1) of the Vienna Convention on Consular Rights[4] provides that when an individual is arrested outside of his nation of citizenship, the nation undertaking the arrest shall, among other things, "without delay" inform the person detained of his right to communicate with consular officers from his native country. Although police officers read Medellin his *Miranda* rights following his arrest (and he explicitly waived his right to remain silent), it is uncontested that he was not informed of his Vienna Convention right to communicate with Mexican consular officials.

Medellin's counsel did not raise the Vienna Convention issue at trial, although he was fully aware that law enforcement officials had not complied with their obligations under the treaty.[5] Nor did he do so in connection with Medellin's direct appeal of his conviction and sentence. Medellin did not raise the issue until he filed an application for a writ of habeas corpus with the trial court nearly *four years* after his conviction.

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[3] Materials included in the appendix to the certiorari petition filed in No. 04-5928 are referenced herein as "*Medellin I* Pet. App ," along with a citation to the page number in that appendix.

[4] 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"). Article 36 of the Vienna Convention is reprinted at *Medellin I* Pet. App. 137a-138a.

[5] Had counsel done so, the trial judge would, of course, have been in a position to take any corrective action he deemed necessary to ensure a fair trial. For example, if he determined that police failed to inform Medellin of his consular rights despite knowledge of his Mexican citizenship, he could have considered a request to exclude Medellin's written statement to police or to delay the trial until Mexico had been given an opportunity to provide whatever legal assistance it might have chosen to give the defense.

The Texas Court of Criminal Appeals affirmed Medellin's conviction and sentence in March 1997. *Medellin I* Pet. App. 1a-31a. He did not seek review of that decision in this Court. In January 2001, the trial court recommended that Medellin's habeas corpus petition be denied. *Id.* 34a-58a. The trial court rejected claims that Medellin had not received effective assistance of counsel at trial and on direct appeal. *Id.* It further found that Medellin had waived his right to object to his conviction based on any violations of the Vienna Convention because he did not raise that objection either during or before trial. *Id.* 46a-48a. It further found that reversal of the conviction or sentence based on a Vienna Convention violation was unwarranted in the absence of any showing that Medellin had been prejudiced by the violation. *Id.* 48a. Based on the trial court's findings and conclusions, the Texas Court of Criminal Appeals denied Medellin's habeas corpus petition in October 2001. *Id.* 33a-34a.

Medellin thereafter filed a habeas corpus petition in federal district court in Houston. The district court denied that petition in June 2003. *Id.* 59a-118a. The court denied Medellin's ineffective assistance of trial counsel claim on the merits. *Id.* The court rejected Medellin's Vienna Convention claim, both on the merits and because consideration of the claim was barred by Texas's contemporary objection rule. *Id.* 79a-85a. Citing this Court's decision in *Breard v. Greene,* 523 U.S. 371 (1998), the district court held, "Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule." *Id.* 82a.

While Medellin's appeal to the Fifth Circuit was pending, the ICJ issued its decision in *Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. No. 128 (Mar. 31, 2004). Pet. App. 86a-186a. *Avena* was a proceeding initiated by

Mexico against the United States, in which Mexico complained that American police routinely fail to advise Mexican nationals arrested in the United States of their right to communicate with Mexican consular officials. Although neither Medellin nor Texas was a party to that proceeding, the complaint alleged that Medellin and 51 other individuals sentenced to death by American courts had not been afforded their rights under the Vienna Convention.

The *Avena* decision contains no indication that the ICJ had before it any specific information regarding Medellin's case. The decision indicates that Mexico submitted to the ICJ declarations from "a number" of the 52 Mexican nationals, attesting that they had never been informed of their Vienna Convention rights, but it does not indicate whether Medellin was one of those who provided an affidavit. *Avena*, ¶ 76. The decision further indicates that Medellin's was not one of the cases in which the United States submitted evidence contesting Mexico's allegation that the defendants were not provided timely notification of their Vienna Convention rights. *Id.* ¶¶ 74-90. Based on that evidence, the ICJ concluded that the United States had violated the Vienna Convention rights of Medellin and 50 of the 51 other Mexican nationals. *Id.* ¶ 90. The ICJ ruled that an appropriate remedy for those violations consisted of an obligation of the United States to "permit review and reconsideration of these nationals' cases by the United States courts" to determine whether any of the violations "caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* ¶ 121. The ICJ further ruled that this "review and reconsideration" obligation should be carried out without regard to any "procedural default" rule whereby the defendant could be deemed to have waived his right to raise Vienna Convention issues by failing to raise them in state court. *Id.* ¶¶ 111-113, 133-143.

The parties brought the *Avena* decision to the attention of the Fifth Circuit. The Fifth Circuit nonetheless denied Medellin's request for a certificate of appealability (COA) from the district court's denial of the habeas corpus petition. *Medellin I* Pet. App. 119a-135a. In denying a COA on Medellin's Vienna Convention claim, the Fifth Circuit held both that the claim was procedurally defaulted and that the Vienna Convention does not confer an individually enforceable right. *Id.* at 131a-133a. The court recognized that *Avena*'s ruling on procedural defaults contradicted *Breard*, but held that *Breard* "directly control[led]" and that it was bound to follow *Breard*. *Id.* at 132a.

On February 28, 2005, after this Court had granted a petition to review the Fifth Circuit's decision, President George W. Bush issued a written determination regarding the *Avena* decision. The determination stated, "[T]he United States will discharge its obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Pet. App. 187a. The determination did not specify what steps by a State court would constitute "giv[ing] effect" to *Avena*. This Court subsequently dismissed the writ of *certiorari* as improvidently granted, "[i]n light of the possibility that the Texas courts [would] provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum." *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).

On November 15, 2006, the Texas Court of Criminal Appeals voted unanimously to dismiss Medellin's "subsequent" habeas corpus petition (*i.e.*, the second such petition filed in state court). Pet. App. 1a-79a. The court ruled that Article 11.071, § 5(a) of the Texas Code of Criminal

Procedure barred Medellin's subsequent petition because he failed to demonstrate that the claims raised therein could not have been presented in the initial petition "because the factual or legal basis for the claim" was unavailable on the date of the initial petition. Pet. App. 56a-64a.

The court also held that neither *Avena* nor the Presidential determination required the court, notwithstanding § 5(a), to consider Medellin's claims. The appeals court judges unanimously agreed that *Avena* did not require the court to "set aside Section 5 and review and reconsider [Medellin's] Vienna Convention claim," citing this Court's 2006 ruling in *Sanchez-Llamas* that "claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." Pet. App. 24a, 21 (quoting *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006)). While the judges also unanimously ruled that the Presidential determination did not require abrogation of § 5(a), none of the ruling's rationales, set forth in the various concurring opinions, garnered majority support. In her concurring opinion, Judge Keller articulated a rationale grounded in federalism. Pet. App. 64a-71a. She termed the President's action "unprecedented" and "unnecessary" (because "the adversary system offers the foreign national the opportunity to raise a Vienna Convention claim before and during trial") and stated:

> [A] president cannot use his foreign affairs authority to intrude into the state arena with impunity: at some point, the national interest is served in too attenuated a manner by the specific presidential action, and the state interest intruded upon is too fundamental, to permit a president's intervention. Such a case is now before us. . . . [The Presidential determination] attempts to *force* the states to conduct proceedings they would not otherwise conduct

and to do so in a manner inconsistent with their own procedures.

Id. 69a-70a (emphasis in original).

SUMMARY OF ARGUMENT

Although the federal government has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, this Court has recognized that the Constitution "'leaves to the several States a residuary and inviolable sovereignty.'" *New York v. United States*, 505 U.S. 144, 188 (1992) (quoting *The Federalist No. 39*, p. 245 (J. Madison) (C. Rossiter ed. 1961). One such area of inviolable sovereignty is the administration of state courts. In attempting to force the Texas courts, in violation of long-established Texas judicial rules of procedure, to hear Medellin's procedurally defaulted Vienna Convention claims, President Bush is impinging on Texas sovereignty in an unprecedented and constitutionally impermissible manner.

When deciding constitutional issues of this nature, the Court generally has sought guidance from three principal sources: (1) the Nation's historical understanding and practice; (2) the structure of the Constitution; and (3) the Court's case law. *Printz v. United States*, 521 U.S. 898, 905 (1997). All three factors indicate that the Constitution does not permit the federal government to commandeer the resources of state courts in the manner contemplated by the President's determination.

First, the President's actions are unprecedented. Medellin and his supporting *amici* have not pointed to a single prior instance in which the federal government forced state courts to assert jurisdiction over a category of claims in

violation of long-established and uniformly applied state procedural rules. The rule that the federal government is seeking to abrogate here – the contemporaneous objection rule – is particularly venerable and has been recognized by this Court as serving important functions in the administration of justice.

State courts of general jurisdiction are, of course, required to follow federal law, where applicable, in cases and controversies that come before them.[6] But as this Court has made clear, that requirement is simply a reflection of the understanding that our Nation has but one system of laws, composed of federal law, general law, and the laws of the 50 States. Thus, the requirement that state courts follow federal law is no more an intrusion on State sovereignty than is the requirement that they afford full faith and credit to the laws and judicial decrees of their sister States. But it is an altogether different matter for the federal government to seek to re-write the jurisdictional and procedural rules of state courts for the purpose of requiring those courts to hear claims barred under uniformly applied state-court rules. Such an effort is unprecedented in historic understanding and practice.

Second, the structure of the Constitution indicates that the Framers did not intend to permit the federal government to control the internal workings of state courts. In particular, Article III strictly limits the power of this Court to review state court decisions; while the Court has jurisdiction to review decisions raising federal law issues, its jurisdiction does not extend to reviewing decisions based on state law. Moreover, the structure of the Constitution reflects the Framers'

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[6] Moreover, to the extent that federal law applicable to a case pending in state court conflicts with state law, the Supremacy Clause, U.S. Const., art. VI, cl. 2, mandates that federal law should prevail.

understanding that the federal government was empowered to regulate individuals, not States.

Third, this Court's case law demonstrates a commitment to preserving the sovereign interests of state courts. While the Court regularly corrects what it deems erroneous interpretations of federal law by state courts, it has never asserted any supervisory authority over the manner in which those courts conduct their business. Nor has it asserted that the Constitution requires state courts to create additional layers of review to permit civil and criminal litigants to press federal claims that they failed to raise in initial proceedings. Moreover, the Court has disclaimed authority to overrule state court invocation of fair, uniformly applied procedural rules that result in a federal claim not being heard on its merits.

In light of the above, President Bush exceeded his constitutional authority when he directed the Texas courts to rehear Medellin's Vienna Convention claims and, while doing so, to follow a series of procedural rules dictated by the President. Medellin and his competent trial counsel were provided a reasonable opportunity to raise the Vienna Convention claims at or before trial, but they failed to do so. Under long established Texas procedural rules, that failure barred the Texas courts from considering those claims in connection with either his first or his second habeas corpus proceedings. In applying that procedural bar, Texas is not in any way discriminating against federal rights; rather, the procedural rule applies uniformly to federal and nonfederal claims alike and, as this Court has recognized, serves important functions in the administration of justice.

Moreover, the President has an obvious alternative means of achieving the foreign policy objectives set forth in his Presidential determination: he could direct that Medellin's

claims be considered by the federal courts. While a Presidential order directing the federal courts to consider the merits of Medellin's Vienna Convention claims may present a separate set of problems,[7] those are problems that should be worked out among the three branches of the federal government. The President should not be permitted to commandeer the state courts to do his foreign policy bidding simply because of concerns that the federal courts might not be willing to do so.

The judgment below should also be affirmed on alternative grounds: the Texas courts have already fully complied with the *Avena* judgment. The Texas Court of Criminal Appeals in 2001 examined Medellin's Vienna Convention claims and determined them to be without merit – because Medellin failed to demonstrate that he was prejudiced by the failure of law enforcement officials to comply with the Vienna Convention. *Avena* requires nothing more. The fact that the Texas court's examination pre-dated *Avena* is immaterial; the record does not indicate that the ICJ had any awareness of the status of Medellin's appeals when it rendered its judgment in 2004, and its decision does not indicate any concern regarding the precise timing of the examination of the Vienna Convention claims of Medellin and the other 50 Mexicans. Its only apparent concern was that all such claims receive some type of merits-based examination. Because the Texas Court of Criminal Appeals provided such an examination, this Court ought to bring state court proceedings to an end and limit Medellin to pursuit of his pending federal court claims. Justice for the victims of Medellin's heinous crimes, and for their families, requires nothing less.

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[7] A federal court might be concerned, for example, that Congress has barred it from asserting jurisdiction over the claims.

ARGUMENT

I. THE FEDERAL GOVERNMENT MAY NOT COMMANDEER TEXAS'S COURTS AND REQUIRE THEM, IN VIOLATION OF TEXAS LAW, TO EXERCISE JURISDICTION OVER MEDELLIN'S SECOND HABEAS PETITION

Although the federal government has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, this Court has recognized that the Constitution "'leaves to the several States a residuary and inviolable sovereignty.'" *New York v. United States*, 505 U.S. at 188 (quoting *The Federalist No. 39*, at 245 (J. Madison). One such area of inviolable sovereignty is the administration of state courts. In attempting to force the Texas courts, in violation of long-established Texas judicial rules of procedure, to hear Medellin's procedurally defaulted Vienna Convention claims, President Bush is impinging on Texas sovereignty in an unprecedented and constitutionally impermissible manner.

The President asserts that impinging on the sovereignty of Texas's courts is essential to allow him to carry out important foreign policy objectives. But the strength of the federal government's interests has never been deemed a relevant factor in determining whether the Constitution permits the federal government to commandeer state government functions. *See, e.g., New York*, 505 U.S. at 178; *Printz*, 521 U.S. at 932. Moreover, the President's directive to the Texas courts overlooks an obvious alternative that would avoid all federalism issues: directing that review of Medellin's claims take place in federal court, where Medellin has yet another habeas corpus petition pending. Nothing in the *Avena* decision suggests that the ICJ expected review to take place in state court rather than federal court.

Medellin asserts repeatedly that Texas's interests are of no constitutional significance because, to the extent those interests conflict with federal government policy, the Supremacy Clause mandates that they must give way to federal law. But mere citation to the Supremacy Clause does not begin to respond to Texas's federalism argument. The Supremacy Clause provides that "the Laws of the United States" shall be "the supreme Law of the Land" and binding on all state courts so long as the laws are "made in Pursuance" of the Constitution. U.S. Const., Art. VI, cl. 2. Assuming for the sake of argument that the President's directive should be included among the "Laws of the United States," the issue before the Court is whether the federal government was acting in accord with the Constitution when it adopted that law. If not, then the federal government's claim to supremacy evaporates. *See Printz*, 521 U.S. at 924-25.[8]

There is no merit to Medellin's contention that undertaking review in the state courts somehow comports with the federalism concerns expressed in *Younger v. Harris*, 401 U.S. 37, 44 (1971). Pet. Br. 32. *Younger* bars federal courts from hearing collateral challenges to on-going criminal proceedings in state court. That decision cannot be read to suggest that federalism interests are served by *requiring* States to entertain collateral challenges to state-court criminal convictions, particularly when such challenges are procedurally barred under state law.

New York and *Printz* illustrate that the Court has not hesitated to impose limits on federal government actions when those actions threaten the inviolable sovereignty of the States.

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[8] A similar analysis applies to Medellin's claim that ICJ judgments issued pursuant to Senate-ratified treaties (such as the *Avena* judgment) constitute the supreme law of the land.

When deciding constitutional issues of this nature, the Court generally has sought guidance from three principal sources: (1) the Nation's historical understanding and practice; (2) the structure of the Constitution; and (3) the Court's case law. *Printz*, 521 U.S. at 905. All three factors indicate that the Constitution does not permit the federal government to commandeer the resources of state courts in the manner contemplated by the President's determination.

A. The Historical Practice and Understanding in This Nation Is That the Federal Government Neither Dictates the Jurisdiction of State Courts nor Interferes with Uniformly Applied State Procedural Rules That May Prevent Some Litigants from Asserting Federal Claims

The unprecedented nature of the President's directive calls into serious question the constitutional propriety of his action. Medellin and his supporting *amici* have not pointed to a single prior instance in which the federal government forced state courts to assert jurisdiction over a category of claims in violation of long-established and uniformly applied state procedural rules.

Sanchez-Llamas v. Oregon, 126 U.S. 2669 (2006), rejected the ICJ's conclusion (articulated in both *Avena* and *The LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27, 2001)) that the Vienna Convention should be interpreted to preclude application of state-law procedural default rules to Article 36 claims. In so holding, the Court stressed the venerable nature of procedural default rules and the important role they have played throughout American history in our adversarial system of justice. The Court explained that that system:

> [R]elies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate the law's important interest in the finality of judgments. The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny "legal significance" – in the *Avena* and *LaGrand* sense – to otherwise viable legal claims.

Sanchez-Llamas, 126 S. Ct. at 2685-86. The Court concluded that allowing litigants seeking to raise Vienna Convention claims to avoid application of procedural default rules would be "inconsistent with the basic framework of an adversary system" and would undermine "any number of other" state-court procedural rules, including statutes of limitation. *Id.* at 2686.

Printz included an extended discussion of scattered instances in early American history in which Congress assigned responsibility to state courts to administer federal statutes. *Printz*, 521 U.S. at 905-08.[9] The Court concluded

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[9] For example, "the first Congress required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155." *Id.* at 905-06. The Court noted, however, that these might well not have been instances in which the federal government directed state courts to expand their jurisdiction because the statutory requirements may have applied "only in States that authorized their

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that the record was unclear regarding whether the early federal government was ever deemed entitled to force state courts to administer federal laws without their consent. *See, e.g., id.* at 806 (citing *United States v. Jones*, 109 U.S. 513, 519-20 (1883), for the proposition that obligations to enforce naturalization laws were imposed "with the consent of the States" and "could not be enforced against the consent of the State."). Because early federal trial courts did not possess federal question jurisdiction, the great bulk of lawsuits raising federal questions were filed in state courts. But that evidence is unexceptionable; each of the States maintained courts of general jurisdiction which would have had no reason to resist jurisdiction over cases raising questions of federal law.

While there is little or no evidence that state courts were ever required by the federal government to exercise jurisdiction over cases not otherwise within their jurisdiction, or to abrogate uniformly applied state procedural rules, that is not to say that state courts have ever been free to ignore federal law or federal causes of action. To the contrary, this Court has declared repeatedly that state courts are never free to ignore federal law. *See, e.g., Testa v. Katt*, 330 U.S. 386 (1947). That rule is dictated by the Supremacy Clause, which provides that "the Judges in every State shall be bound [by federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[10] But that truism is a

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[9](...continued)
courts to conduct naturalization proceedings." *Id.* at 906.

[10] The Court has explained this requirement as simply a reflection of the understanding that our Nation has but one system of laws, composed of federal law, general law, and the laws of the 50 States. As stated in *Howlett v. Rose*:

(continued...)

wholly distinct question from whether the federal government may commandeer state courts to do their bidding; the historical understanding and practice provides no support for the latter practice.

This Court has repeatedly disclaimed any federal power to order the expansion of state court jurisdiction or to interfere with uniformly applied state court procedural rules. *See Howlett,* 496 U.S. at 372 ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds

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[10](...continued)

Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with coordinate responsibility to enforce that law *according to their regular modes of procedure*. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876).

Howlett v. Rose, 496 U.S. 356, 367 (1990). *See also The Federalist No. 82* p. 345 (A. Hamilton). The understanding that the Nation has but one system of laws also animates the Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, which requires each State to give full faith and credit to the public acts and judicial proceedings of any other State.

them.'") (quoting Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981); *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56 (1912).

The Court has prohibited States from adopting non-uniform jurisdictional requirements that discriminate against federal causes of action. Thus, *Howlett* prohibited Florida from eliminating state-court jurisdiction over federal constitutional claims against state entities while simultaneously maintaining jurisdiction over state-law suits against those same entities. *Howlett*, 496 U.S. at 379-80. *Testa* held that Rhode Island courts could not refuse to exercise jurisdiction over an action raising claims under a federal price control law, when "the Rhode Island courts ha[d] jurisdiction adequate and appropriate under established local law to adjudicate th[e] action." *Testa*, 330 U.S. at 393. Similarly, *Mondou* held that Connecticut state courts could not refuse to exercise jurisdiction over actions brought under the Federal Employers Liability Act "when their jurisdiction, as prescribed by local law is adequate to the occasion." *Mondou*, 223 U.S. at 59. But case law prohibiting discrimination against federal causes of action is of no relevance here. The Texas contemporaneous objection rule does not discriminate against federal rights; rather, in general it bars consideration of *any* legal claim, whether based on federal or state law, not raised in a timely manner.

In sum, the general understanding and practice throughout American history has been that the federal government neither dictates the jurisdiction of state courts nor interferes with uniformly applied state procedural rules – even when application of those rules prevent a litigant from asserting a federal claim.

B. The Constitution Establishes a System of Dual Sovereignty Inconsistent with Federal Control Over the Jurisdiction and Procedures of State Courts

The structure of the Constitution indicates that the Framers did not intend to permit the federal government to control the internal workings of state courts.

It is incontestable that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The States' retention of an "inviolable sovereignty" is:

> [R]eflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the Amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guaranty Clause, Art. IV, § 4, which presupposes the continued existence of the states and those means and instrumentalities which are the creation of their sovereign and reserved rights.

Printz, 521 U.S. at 919 (internal quotations omitted).

More importantly for the issue at hand, the Constitution reflects the Framers' understanding that the federal government would operate most effectively if it imposed its regulations on citizens directly, rather than indirectly through the instrumentalities of state governments. "The Framers' experience under the Articles of Confederation had persuaded them that using the States as instruments of federal governance

was both ineffectual and provocative of federal-state conflict." *Id.* Thus, as explained in *New York*:

> In providing a stronger central government, . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . . [T]he Court has consistently respected that choice.

New York, 505 U.S. at 166. Accordingly, the structure of the Constitution suggests that the Framers did not intend to permit the federal government to commandeer state courts for the purpose of achieving policies to its liking. Rather, they most likely intended that the federal government would seek to achieve its policy objectives using its own instrumentalities – in this instance, the federal courts.

The Framers' desire to limit the federal government's direct control over state courts is also reflected in Article III's limitation on federal judicial power. Art. III, § 2 extends federal judicial power to cases arising under the Constitution or laws of the United States, but does not – except in limited circumstances – grant federal court jurisdiction over cases raising purely state law issues. That provision has been interpreted since the 1820s as granting the Court jurisdiction to review state court decisions raising federal law issues but not state court decisions based on state law. *Cohens v. Virginia*, 19 U.S. 264, 422 (1821). The Court thereafter has consistently disclaimed the power to second-guess state courts' interpretations of state law, holding that "a State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

C. Case Law Supports the Historical Understanding That Federal Government Commandeering of State Courts Is Inconsistent with the System of Dual Sovereignty

This Court's case law demonstrates a commitment to preserving the sovereign interests of state courts. While the Court regularly corrects what it deems erroneous interpretations of federal law by state courts, it has never asserted any supervisory authority over the manner in which those courts conduct their business. *See, e.g., Sanchez-Llamas*, 126 S. Ct. at 2679 ("'Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.'") (quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982).[11] Any federal government effort to re-write uniformly applied state court procedural rules is inconsistent with the Court's disclaimer of supervisory authority.

The Court has held that the Constitution does not compel Texas to provide convicted criminals with *any* access to the state courts for the purpose of seeking habeas corpus relief. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Nonetheless, Texas provides greater opportunities for post-conviction relief than is constitutionally required – it permits convicted criminals to seek post-conviction relief with respect to claims that: (1) have not been waived under the contemporaneous objection rule based on a failure to raise them at or before trial; and (2) are not barred by Article 11.071, § 5(a)'s limitations on claims raised in a subsequent

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[11] Indeed, the Constitution imposes limitations on the powers of all branches of the federal government to supervise state courts. For example, Congress is not permitted to dictate retirement policies for state judges. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

habeas corpus petition. It is difficult to imagine that the United States would be asking that the Texas Court of Criminal Appeals be *compelled* to consider Medellin's habeas petition if Texas law made no provision whatsoever for the filing of such petitions. Accordingly, it makes no sense to suggest that Texas – simply because it has left the door slightly ajar by permitting habeas petitions to be filed in a limited number of cases – can be compelled to open the door all the way and to allow Medellin to raise claims that are procedurally barred under longstanding, uniformly applied state procedural rules. Medellin has cited no cases that so hold.

Moreover, numerous decisions have established that this Court will not overturn a state court judgment decided on the basis of a uniformly applied procedural rule, even when the result of invoking the rule is that a litigant is denied an opportunity to assert a federal claim.[12] *See, e.g., Spies v. Illinois*, 123 U.S. 131, 180-81 (1887) (murder defendant's due process claim not subject to review in Supreme Court because defendant had failed to raise that claim in the trial court); *Brown v. Massachusetts*, 144 U.S. 573, 579-580 (1892); *Jacobi v. Alabama*, 187 U.S. 133, 135 (1902); *Harding v. Illinois*, 196 U.S. 78, 86 (1904); *Chesapeake and Ohio Ry. Co. v. McDonald*, 214 U.S. 191, 193-94 (1909); *John v. Paullin*, 231 U.S. 583, 178-79 (1913) ("Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and state law and

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[12] *Amici* located no such decisions pre-dating adoption of the Fourteenth Amendment. The paucity of such decisions may well reflect that, prior to adoption of the Fourteenth Amendment, there were very few opportunities for those charged with crimes in state court to interpose a defense based on federal law.

practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.").

Each of the preceding cases reached the Court on writ of error. The Court's authority to grant such writs was limited somewhat by § 709 of the Revised Statutes of the U.S., which required a party seeking a writ of error in a state court case to demonstrate, *inter alia*, that the federal issue at stake had been explicitly brought to the attention of the state court. *See, e.g., Chesapeake & Ohio*, 214 U.S. at 192. Accordingly, although the Court's case law from the late 19th and early 20th centuries demonstrates an unwillingness to second-guess state court invocation of procedural rules to block consideration of federal claims, that unwillingness may have been based at least in part on statutory constraints.

However, even after the lifting of those statutory constraints in 1925, the Court has continued to rule that it is without power to overturn a state court decision issued on the basis of a uniformly applied procedural default rule, even when the decision prevents a federal claim from being heard. Those rulings indicate that the Court deems itself constitutionally prohibited from overturning such state court decisions, so long as the affected party had a fair opportunity to raise his or her federal claim in state court. In *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925), the Court explained, "But there is nothing in these case which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, *if the practice gives the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court*" (emphasis

added). Similarly, in *Herb v. Pitcairne*, 324 U.S. 117, 125 (1945), the Court held, "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *See also Michel v. Louisiana*, 350 U.S. 91, 99 (1955) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.").

In sum, nothing in the case law provides any support for the notion that federal officials are free to commandeer the state courts when they deem it necessary to serve their foreign policy interests. To the contrary, the Court has repeatedly expressed its unwillingness to interfere with state courts' application of their uniformly applied procedural rules – rules that often prevent litigants from raising federal issue.

D. The Federal Government Exceeds Its Powers in Ordering Texas Courts to Hear a Case That Could More Easily Be Heard in Federal Court

In light of the foregoing, President Bush exceeded his constitutional authority when he directed the Texas courts to rehear Medellin's Vienna Convention claims. His directive was particularly obtrusive in that it directed Texas to give effect to the *Avena* decision "in accordance with principles of comity." Pet. App. 187a.[13] This wholesale commandeering of

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[13] In its 2005 brief in *Medellin I*, the federal government explained that the command that *Avena* be given effect "in accordance with principles of comity" was intend to restrict Texas's options considerably. The President was directing Texas courts not only not to apply any sort of procedural default rule, but also not to "reexamine

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the Texas courts for the purpose of serving the federal government's foreign policy objectives cannot be squared with the federalism principles described above.

There is no reasonable dispute that Medellin and his competent trial counsel (who was well aware of the Vienna Convention issue) had ample opportunity to raise the issue at or before trial. Had they done so and demonstrated prejudice, the trial court would have been in a position to delay the trial long enough to give Mexico an opportunity to provide whatever legal assistance it might have chosen to give the defense. They trial court could also have considered a motion to exclude Medellin's written statement to police (*but see Sanchez-Llamas*); had that statement been excluded, the jury could have determined Medellin's fate based solely on the remaining, overwhelming evidence of Medellin's guilt (including the statements of other gang members and the testimony of others to whom Medellin confessed his guilt). Thus, Medellin has only himself to blame for whatever prejudice he suffered by failing to raise his Vienna Convention claims in a timely manner. Under our adversarial system of justice, Texas has compelling reasons (as outlined above and in *Sanchez-Llamas*) for invoking long-standing state procedural rules to bar Medellin from re-raising his Vienna Convention claims. In doing so, Texas is no more refusing to enforce federal law than are countless courts that regularly

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[13](...continued)
whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." Brief for the United States as *Amicus Curiae* in No. 04-5928, at 46.

prevent criminal defendants from raising important federal constitutional rights in an untimely manner.[14]

The reason this Court is permitted to review questions of federal law decided by state courts is to ensure that the federal government does not lose the power to enforce its own laws in a uniform manner. *Cohens*, 19 U.S. at 384-85. But that is not a danger here. Texas courts are not refusing to enforce federal law or exercising their jurisdiction in a manner that discriminates against federal law. They are simply enforcing long-standing procedural rules in a manner well-recognized as serving the ends of justice. Under those circumstances, there can be no justification for the President to intrude into the Texas judicial system in this unprecedented fashion.

The President's actions are particularly unjustified given the availability of an alternative means of achieving the foreign policy objectives set forth in his Presidential determination: he could direct that Medellin's claims be considered by the federal courts. While a Presidential order directing the federal courts to consider the merits of Medellin's Vienna Convention claims may be met with skepticism by

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[14] Indeed, both Medellin and the United States appear to recognize that the courts are within their rights in applying at least some of their procedural rules in a manner that could cut off Medellin's assertion of his Vienna Convention claim. Medellin conceded that he filed his subsequent habeas petition when he did (*i.e.*, while the first Supreme Court case was still pending) because he feared that failure to do so would create a danger that his claims would be barred under Texas's statute of limitations. Pet. Br. 11. He further conceded that he filed his pending federal habeas petition based on similar fears. *Id.* 15 n.7. Both Medellin and the United States concede that merits consideration in the federal courts of his Vienna Convention claims might be barred by congressionally mandated restrictions on access to federal habeas corpus. *Id.* 32; U.S. Br. 4.

those courts, those are problems that should be worked out among the three branches of the federal government. The President should not be permitted to commandeer the state courts to do his foreign policy bidding simply because of concerns that the federal courts might not be willing to do so.

If the federal government ultimately determines that Medellin – the confessed murderer of two teenage girls – is being held by Texas authorities in violation of federal law, it is entitled to order his release. But if it does so, it should be made to bear responsibility for what undoubtedly would be a politically unpopular decision, and not be permitted to escape responsibility by foisting the decision-making process onto the Texas judiciary. As this Court has explained, requiring government officials to take responsibilities for their own actions is one of the principal virtues of our system of dual sovereignty. *New York*, 505 U.S. at 168-69.

Medellin has already made clear by his actions that, regardless how the Texas courts ultimately rule on his claims, he intends to take those claims back into the federal court system. Accordingly, it serves no interest of the President to require, in violation of long-standing state procedural rules and our cherished ideals of federalism, that those claims first be heard on the merits in the courts of Texas.

II. TEXAS COURTS HAVE ADEQUATELY CONSIDERED MEDELLIN'S CLAIM THAT HE WAS PREJUDICED BY THE VIENNA CONVENTION VIOLATION

The judgment below should also be affirmed on alternative grounds: the Texas courts have already fully complied with the *Avena* judgment. The Texas Court of Criminal Appeals in 2001 examined Medellin's Vienna

Convention claims and determined them to be without merit – because Medellin failed to demonstrate that he was prejudiced by the failure of law enforcement officials to comply with the Vienna Convention. *Avena* requires nothing more.

The fact that the Texas court's examination pre-dated *Avena* is immaterial; the record does not indicate that the ICJ had any awareness of the status of Medellin's appeals when it rendered its judgment in 2004, and its decision does not indicate any concern regarding the precise timing of the examination of the Vienna Convention claims of Medellin and the other 50 Mexicans. Nor did the ICJ specify what, if any, relief should be afforded to those individuals. Its only apparent concern was that all such claims receive some type of merits-based examination. Because the Texas Court of Criminal Appeals provided such an examination, this Court ought to bring state court proceedings to an end and limit Medellin to pursuit of his pending federal court claims. Justice for the victims of Medellin's heinous crimes, and for their families, requires nothing less.

CONCLUSION

Amici curiae WLF, Randy and Sandra Ertman, and the Allied Educational Foundation, respectfully request that the Court affirm the decision below.

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Dated: August 23, 2007

Counsel wish to thank Joseph Baker and Gabriel Brake, students at Texas Tech University School of Law, for their assistance in preparing this brief.